claimed there was no basis for winding-up proceedings to be instituted and accordingly the petition had to be struck out. It was also urged upon the court, if I understood Mr Fam correctly, that the question of the debt was in fact sub judice as the civil suit was in effect still pending because the notice of discontinuance was defective as it was filed in breach of O 21 r 2(1).

In response, Mr Ong Ban Chai, counsel for the petitioner, argued that the application itself was 'not proper' as the respondent should have proceeded under s 221 of the Companies Act and that in any event upon the presentation of the winding-up petition the court could order a stay of the proceedings in the civil suit under s 222. He argued further that the winding-up petition had to be heard and the main issue the court had to consider under s 218(2)(c) was whether the respondent was unable to pay its debts and in such consideration the prospective liabilities of the respondent had to be taken into account.

Order 18 r 19(3) specifically provides that the rule applies to a petition which must include a winding-up petition (see *NKM Development Sdn Bhd* v *Irex Sdn Bhd*[2] at p 66). I did not see the relevance of s 221 as what was seised of by the court on the day of the hearing was not the winding-up petition but the application to strike out the petition under O 18 r 19. I was satisfied that the application was properly before me and I was also satisfied on the evidence presented that there was a bona fide dispute as to the amount that was owing to the petitioner. That dispute was the subject of the civil suit, which had not been properly discontinued by Messrs Ong Ban Chai & Co for want of leave of the court under O 21 r 2(1) so that the civil suit could be considered as still pending between the parties. I could not help thinking that the filing of the notice of discontinuance and the subsequent presentation of the winding-up petition were all acts calculated to circumvent the normal course of going to trial after the dismissal of the application for summary judgment under O 14 and to embarrass the respondent. In the circumstances I considered the presentation of the winding-up proceedings as an abuse of the process of the court and I accordingly granted an order in terms of the first three prayers of the application, ie that the petition be struck out, that costs of the application be borne by the petitioner and that a date be fixed for enquiry into the damages suffered by the respondent.

Order accordingly.

Solicitors: *PC Low & Co*; *Ong Ban Chai & Co.*

Reported by *Wong Kim Fatt*

Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd

HIGH COURT (JOHORE BAHRU) – COMPANIES (WINDING-UP) NO 42-125 OF 1986
LC VOHRAH J
22 MARCH 1989

Companies and Corporations – Winding-up – Petition based on default judgment – Application by respondent to set aside judgment – Withdrawal of suit by plaintiff – Application to set aside winding-up order – Petition could not stand after withdrawal of suit

This was an application by the respondent for the setting aside of an order to wind up the respondent. The petition for winding-up of the respondent was based on a judgment in default of appearance in Civil Suit No C 4553 of 1985 in the High Court at Kuala Lumpur for the sum of $266,150 together with interest and costs. The respondent as defendant in the civil suit made an application to set aside the default judgment and the application was fixed for hearing on 14 October 1987. However, before the hearing, the petitioner as plaintiff in the civil suit filed an application to withdraw the civil suit and an order for such withdrawal was granted. Meanwhile the petition had come up for hearing in the High Court at Johore Bahru but was adjourned twice. On 25 April 1988, in the absence of the respondent's counsel the court on the application of the counsel for the petitioner granted an order in terms of the petition for the winding-up of the respondent. Counsel for the respondent argued that the petition could not stand because the civil suit which the default judgment had been obtained no longer existed having been withdrawn at the instance of the petitioner, so that the petition could not be sustained as the judgment upon which the petition was founded could not subsist independently of the civil suit from which it arose.

Held, allowing the application:

(1) The argument of counsel for the respondent/applicant clearly indicated that prima facie the petition as it stood could not be sustained. As a matter of common sense and in the light of authorities, the court took the view that the winding-up order should in the circumstances not have been made and should be set aside.

(2) An order in terms of the application was granted for: (a) all proceedings consequential upon the winding-up order to be stayed; (b) the winding-up order to be set aside and the petition set down for hearing; and (c) the respondent upon the setting aside of the winding-up order to publish and advertise notices of such order and to serve them upon the Registrar of Companies and the Official Receiver.

(3) The court further ordered that the costs of this application be borne by the petitioner in any event.

Case referred to

1 *Re Anglo-Bavarian Steel Ball Company* (1899) Weekly Notes 80 (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 194

YP Yeo for the respondent/applicant.
Ong Ban Chai for the petitioner/respondent.

Cur Adv Vult

LC Vohrah J: This was essentially an application on the part of the respondent for the setting aside of an order made on 25 April 1988 to wind up the respondent.

The facts in so far as they are relevant to the application were briefly as follows. The petition for the winding-up of the respondent filed on 17 November 1986 was based on a judgment that had been obtained against the respondent on 25 September 1985 in default of appearance in Civil Suit No C 4553 of 1985 in the High Court at Kuala Lumpur for the sum of $266,150 together with interest at the rate of 8% pa from 5 August 1985 to the date of realisation and costs of $225. The respondent as defendant in the civil suit made an application to set aside the default judgment and the application was fixed for hearing on 14 October 1987. However, before the hearing, the petitioner as plaintiff in the civil suit filed an application to withdraw the civil suit and on 16 October 1987 the senior assistant registrar granted an order for such withdrawal. Meanwhile the petition had come up for hearing in the High Court at Johore Bahru on 20 June 1987 when after hearing arguments of both counsel the court adjourned the winding-up proceedings to await the result of the application to set aside the default judgment which had formed the basis of the petition. The petition next came up for hearing on 8 February 1988 when it was adjourned further to 25 April 1988 to enable Mr HK Kee, counsel for the petitioner, to look into the possibility of substituting supporting creditors in place of the petitioner in the face of the contention on the part of Mr YP Yeo, counsel for the respondent that the petition could not stand, founded as it was on a judgment which did not exist as the civil suit had been withdrawn. On 25 April 1988 Mr Ong Ban Chai appeared as counsel for the petitioner instead of Mr Kee but the respondent was not represented either on its own behalf or by counsel. In the absence of any representative on behalf of the respondent the court on the application of Mr Ong granted an order in terms of the petition for the winding-up of the respondent. The failure of Mr Yeo to represent as counsel for the respondent at the last hearing of the petition, it transpired, was quite inadvertent and was due to the inability of the solicitor concerned because of his illness to instruct counsel to attend.

At the hearing of this application to set aside the winding-up order, Mr Yeo argued that the petition could not stand because it was founded solely on the statement in the petition that the respondent was unable to pay its debt of $266,150 together with interest and costs pursuant to the default judgment dated 25 September 1985, a statement of fact which was affirmed as true in the affidavit verifying the petition, and that when the petition came up for hearing on 25 April 1988 that statement of fact did not reflect the true position as the civil suit in which the default judgment had been obtained no longer existed having been withdrawn at the instance of the petitioner so that the petition could not be sustained as the judgment upon which the petition was founded could not subsist independently of the civil suit from which it arose. The logic of this argument was too obvious, in my view, to need any authority to support it. However, Mr Yeo drew my attention to an annotation of *Re Anglo-Bavarian Steel Ball Company*[1] to support his argument. In that case at the time when the winding-up petition was presented, the creditor presenting it had obtained judgment against the company for the debt on which the petition was grounded. Before the hearing of the petition the judgment had been reversed by a divisional court but the petitioner had presented an appeal from that decision to the Court of Appeal. Counsel for the petitioner asked that the petition be stood over until after the appeal was heard or that if the petition was dismissed it be dismissed with costs. Counsel for the company asked that the petition be dismissed with costs. Cozens-Hardy J said that the judgment, having been reversed, must be taken to have been wrong, and that the petition must be dismissed with costs.

Mr Yeo also drew my attention to *Buckley on the Companies Acts* (14th Ed), Vol 1, at p 549 where it is stated:

> An order will not be made if a sufficient case is not stated on the petition, even if such a case is proved in evidence. The order must be made *secundum allegata et probata*.

Although this application was in substance one for the setting aside of a winding-up order which had been made in the absence of counsel for the respondent and consequently for the petition to be set down for further hearing, the argument of Mr Yeo clearly indicated that prima facie the petition as it stood could not be sustained. As a matter of common sense and in the light of Mr Yeo's authorities, I took the view that the winding-up order should in the circumstances not have been made and should be set aside.

I did not think it was appropriate at that stage when hearing the application to consider either the prospective liabilities of the company or the question of amending the petition under r 194 of the Companies (Winding-Up) Rules 1972 as the main purpose of the application was for the setting aside of the winding-up order in order that the petition proper could be set down for further hearing.

I accordingly granted an order in terms of the application for:

(a) all proceedings consequential upon the winding-up order to be stayed;

(b) the winding-up order to be set aside and the petition set down for hearing; and

(c) the respondent upon the setting aside of the winding-up order to publish and advertise notices of such order and to serve them upon the Registrar of Companies and the Official Receiver.

I ordered that the costs of this application be borne by the petitioner in any event because I did not think that counsel for the petitioner should have asked for the petition to be proceeded with in the absence of the respondent's counsel or representative especially as the petition had been adjourned for Mr Kee, the previous counsel for the petitioner, to consider the possibility of substituting creditors in place of the petitioner in the light of the withdrawal of the civil suit and the consequent destruction of the substratum of the petition.

Order accordingly.

Solicitors: *CC Kok & Yeo*; *Ong Ban Chai & Co.*

Reported by *Wong Kim Fatt*

Public Prosecutor v Chan Choon Keong & Ors

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY
CRIMINAL TRIAL NO 56-1-86
FAIZA TAMBY CHIK JC
21 FEBRUARY 1989

Criminal Procedure – Cautioned statement – 'Inducement' – Word 'inducement' not properly explained to accused in Hokkien – Word given by recording officer different from that given by certified court interpreter – Whether proper caution administered

Criminal Procedure – Cautioned statement – 'Oppressive circumstances' negating voluntariness – Elements of

Evidence – Child witness – Evidence to be scrutinized with special care – Need for corroboration

Evidence – Station diaries and lock-up diaries – Used for refreshing of memory rather than evidence of fact stated therein – Not public documents – Only admissible if makers of entries are called

The three accused were charged with kidnapping PW6, a six-year-old girl, an offence under s 3(1) of the Kidnapping Act 1961 read together with s 34 of the Penal Code. In the course of the prosecution's case, the prosecution sought to tender a cautioned statement purportedly made by the third accused. Defence counsel objected to the statement being used as evidence in the trial and the court ordered a trial within a trial to determine whether the statement was admissible as evidence. In the trial within a trial, the court thus had to consider (a) whether a proper caution had been given to the accused (b) whether two station diaries and one lock-up diary could be tendered as evidence (c) whether the cautioned statement was obtained under oppressive circumstances. The court then went on to deal with other aspects of the case.

Held, acquitting the first and third accused and convicting the second accused on his plea of guilty:

(1) An important word as 'inducement' which is obtainable in s 113 of the Criminal Procedure Code has to be explained and made understood to the third accused when administering the caution pursuant to that section. It will not be properly explained to and be understood by the third accused if the recording officer himself did not give the correct word for 'inducement' in Hokkien, be it common Hokkien or otherwise. In this case, the recording officer gave a word in Hokkien for 'inducement' which was different from that given by the certified court interpreter. A proper caution had thus not been administered and such caution had not been properly and fully explained so that the third accused did understand it.

(2) The lock-up register is different from the lock-up diary. Usually, these diaries are used for refreshing of memory rather than evidence of fact stated therein. Thus, station diaries and lock-up diaries are not admissible since they are not public documents and are only admissible if the makers of those entries are called.

(3) The relevant facts to be looked at in considering what are 'oppressive circumstances' negating voluntariness are: (a) characteristics of the accused; (b) period of time during which he was questioned; (c) length of time during which he was in custody; (d) whether or not he was given opportunities of rest and refreshment. Having considered all the evidence in the trial within a trial, the court has no hesitation in coming to the conclusion that the third accused was put under tremendous physical and mental pressure in order to compel him to make a statement.

(4) In dealing with the evidence of visual identification, the court has to remind itself of the special need for caution before convicting the accused in reliance on the correctness of the identification. Conflicting pieces of evidence given by two important and vital prosecution witnesses, ie the investigating officer and the officer who conducted the identification parade, were specific weaknesses in the identification evidence for the prosecution. Moreover, the identification parade was not properly conducted.

(5) PW6 was six years of age at the time of the incident and seven years of age when she gave evidence at the preliminary enquiry and is ten years of age when she gave evidence in this trial without corroboration. Whatever she said in evidence in this trial, it must be scrutinized with special care and children have the tendency to invent and distort.

(6) At the close of the prosecution's case, what has to be decided remains a question of law only. The court has only to consider whether at this stage there is some evidence, as adduced and unrebutted, which if accepted as accurate, would establish each essential element of the offence charged. In the present case, the court found no evidence at all to link the first accused and the third accused with the abduction of PW6 or with the exhibits. The court accordingly acquitted them of the offence under s 3(1) of the Kidnapping Act 1961 read with s 34 of the Penal Code.

(7) In sentencing, the court should balance between the public interest and the deterrent aims. The court accordingly sentenced the second accused to a term of six years' imprisonment to run from and be backdated to the date of his arrest and also to two strokes of whipping.

Cases referred to

1 *Datuk Mokhtar bin Hashim & Anor* v *PP* [1983] 2 MLJ 232 (refd)
2 *Tan Too Kia* v *PP* [1980] 2 MLJ 187 (refd)
3 *Poon Heong* v *PP* [1949] MLJ 114 (refd)
4 *R* v *Fulling* [1987] 2 All ER 65 (folld)
5 *R* v *Priestley* (1966) 50 Cr App R 183 (refd)
6 *R* v *Baskerville* [1916] 2 KB 658 (refd)
7 *Pritam Singh* v *PP* [1970] 2 MLJ 239 (refd)